

Acting Chief, Supply Division

8 February 1949

Office of the General Counsel

Proposed Cancellation of Unnumbered Contract, Purchase
Order

STATINTL

OGC HAS REVIEWED.

1. Your memorandum of 26 January on subject contract has been received and the following information is furnished in answer to the questions raised in the second paragraph.

2. Both parties have executed the contract. If the Agency elects to refuse delivery of the units ordered, it is believed that the contractor has a clear right of action under the Tucker Act which provides for suits based "upon any contract, express or implied, with the Government of the United States, for damages, liquidated or unliquidated, in cases not sounding in tort." The measure of damages upon such breach of contract by the Government is similar to that applicable in the case of a private contract. The contractor may either, (1) treat the contract as rescinded and recover in quantum meruit the value of the services rendered or, (2) treat the contract as a breach and recover damages. In the event that the contractor elects to consider the refusal a breach, he may recover two distinct elements of damages; (1) the cost of the work done under the contract less the market value of materials on hand, and (2) the profit that would have been realized had the contract gone to completion, the profit being computed by deducting from the contract price the estimated cost of performing the entire contract. Damages are, of course, always subject to the limitation that recovery of profit will be allowed only on reasonable proof.

3. It is noted here that the contractor has offered to furnish the units at the contract price less the cost of installation. Since no installation charges have been incurred, the contractor is not making any concessions other than foregoing the elements of profit and overhead which are applicable to such installation. However, acceptance of this proposal raises the question of notation of R. S. Section 3709.

4. It is our understanding that the Contractor is willing to withhold delivery of the units until a later time when installation can be made. For the reasons given above, we believe that this is the advisable course to follow.